APPENDIX A.

UNITED STATES DISTRICT COURT,
Southern District of Iowa,
Eastern Division.

GALE H. JOHNSON,
Petitioner,
vs.
JOHN E. BENNETT, WARDEN,
Respondent.
} Civil No. 2-403-E.

ORDER.

This matter is now before the Court upon the petition of Gale H. Johnson for a writ of habeas corpus. A return has been filed by the respondent.

The petitioner has advanced six contentions in his petition. In essence, three of these contentions were raised by this petitioner in a previous petition which was denied by this Court on July 17, 1961. In the intervening years, however, several Supreme Court decisions, notably *Townsend* v. *Sain,* 372 U. S. 293 (1963) and *Fay* v. *Noia,* 372 U. S. 391 (1963), have significantly affected habeas corpus proceedings. This Court therefore will review all of the contentions raised in the instant petition.

Petitioner first contends that he was deprived of an important trial witness, Thomas Orsucci. The petitioner's trial commenced on November 13, 1934 and a verdict was returned on November 24, 1934. The sheriff serving sub-

poenaes upon witnesses for the petitioner's trial made a return on November 19, 1934 indicating that Thomas Orsucci was being detained in the Clarinda Institution for the Insane. The petitioner has filed an affidavit from this individual indicating that on November 20, 1934, he was being detained in the Polk County Jail. Informal inquiries have established that (1) the records at the Clarinda Institution indicate that a man by the name of Thomas Orsucci has never been a patient there and (2) the Polk County Jail records show that Thomas Orsucci was incarcerated in that jail from November 15, 1934 to December 8, 1934. Such facts appear to contradict the return made by the sheriff. As this Court indicated in a previous order, the petitioner's contention relating to Thomas Orsucci presents a due process question. The applicable law governing this problem was enunciated by the Supreme Court of the United States when it held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963).

The petitioner has filed an affidavit stating that Thomas Orsucci is now deceased, that the whereabouts of this individual was not known by him or his attorneys at the time of his trial and that the testimony of this witness would have been material to his defense.

The crucial question is whether the testimony of Thomas Orsucci was material to a determination of his guilt or punishment. In his affidavit of April 20, 1966, the petitioner makes the following statement:

> "The state's case consisted of circumstantial evidence, identification was made by two state witnesses, who had previously identified Thomas Orcussi. After further investigation it was shown a mistake was made and Mr. Orcussi was released.

> No one can deny the credibility of state witnesses would have been severely damaged, and the fact they had made a previous mistake of identification was extremely important. These facts, were never before the jury and completely unknown. The District Attorney's testimony will also substantiate these facts."

It thus appears that Mr. Orsucci's testimony would have been used in an attempt to impeach the credibility of certain state witnesses. It would not have been related to the substantive elements of the crime itself. Even if the petitioner's statement regarding Orsucci's testimony is accepted as being true, this Court does not feel that it was of sufficient materiality to petitioner's guilt or punishment to declare the suppression thereof a denial of due process.

The petitioner next contends that he was denied due process because not served with a document entitled "Notice of Additional Testimony" until shortly before his trial. This document was apparently served pursuant to Iowa Code § 780.10. This statutory provision requires that if such a document is necessary, it must be served at least four days before the commencement of the trial. The Notice given to the petitioner was dated November 7, 1934. See petitioner's exhibit D. The trial commenced on November 13, 1934. The four day requirement would appear to have been complied with. Even though the petitioner was confined in jail at the time the notice was served, he was represented by counsel. There was no due process violation in connection with this notice.

The petitioner's next two contentions concern perjured testimony at his trial and the introduction of certain exhibits without proper foundation. Both allegations appear to center around the testimony of Charles Ruggles. The testimony of this witness has previously been questioned before this Court. The petitioner previously introduced statements dated January 29 and 30, 1960 in which Mr.

Ruggles indicated that certain testimony he had given at the petitioner's trial was false. After conducting a hearing on an application to perpetuate the testimony of Mr. Ruggles, this Court granted the application on April 20, 1961. The deposition of Mr. Ruggles was then taken in San Bernadino, California on June 20, 1961. In this deposition which was taken in the presence of attorneys representing both the petitioner and the respondent, Mr. Ruggles expressly reaffirmed the testimony he had given at the petitioner's trial and denied the allegations contained in the statements of January 29 and 30, 1960. After again examining the statements and deposition of Mr. Ruggles and considering the conditions under which the same were obtained, this Court finds no basis in this portion of the petition for the granting of a writ of habeas corpus.

Petitioner also alleges that he is being unlawfully deprived of certain trial records. It appears that the reporter who transcribed the petitioner's trial is dead and his shorthand notes cannot be deciphered. It should be noted in this connection that the petitioner was represented by counsel at his trial and on his appeal. A 424 page abstract of the record was prepared in 1935 on behalf of the petitioner. A 125 page brief and a 12 page reply brief were also submitted by petitioner's counsel on the original appeal from his conviction. Under such circumstances, the fact that the petitioner cannot now obtain certain trial records clearly does not deprive him of due process of law. See *Norvell* v. *Illinois*, 373 U. S. 420 (1963); *Christopher* v. *District Court*, 255 Iowa 694, 123 N. W. 2d 892 (1963).

The petitioner's final contention is that due to a jury instruction given by the court at his trial, he was deprived of his right to be presumed innocent until proven guilty and thus deprived of due process of law. The instruction which is the basis for petitioner's contention is as follows:

"16. Evidence has been admitted on behalf of the

defendant of what is known as an alibi, which means that the defendant at the time that the alleged murder is charged to have been committed, was at another place so that he could not have committed the same. You are instructed that such a defense is proper and legitimate as any other, and you are also instructed that you scan the proof of alibi with care and caution, and all the evidence upon this point both for and against this claim of alibi should be scrutinized with care and carefully considered by the jury.

The burden is upon the defendant to prove this defense by a preponderance of the evidence, that is, by the greater weight or superior evidence. The defense of alibi to be entitled to be considered as established must show that at the very time of the commission of the crime the accused was at another place so far away, or under such circumstances that he could not with ordinary exertion have reached the place where the crime was committed so as to have committed the same. If by a preponderance of the evidence the defendant has so shown, the defense must be considered established and the defendant would be entitled to an acquittal. But if the proof of alibi has failed so to show, you will not consider it established or proved. The evidence upon that point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him."

This instruction essentially places the burden of proving an alibi by a preponderance of the evidence upon the defendant. The threshold question now before the Court is whether such an instruction is inconsistent with other instructions to the effect that the state must prove all the elements of the crime charged beyond a reasonable doubt and, if it is inconsistent, does such an inconsistency deprive a defendant of due process of law. It appears to the Court that, to some extent, an inconsistency exists when the "alibi" instruction placing the burden of proof by a preponderance of the evidence upon the defendant is given in

conjunction with other instructions which place the burden upon the state to prove the defendant's guilt beyond a reasonable doubt. An attempt to reconcile the varying burdens of proof is made when the jury is instructed that even if an alibi is not established by a preponderance, the evidence introduced for that purpose is sufficient to acquit the defendant if it establishes a reasonable doubt as to his guilt. Although this aids in clarifying the instructions as a whole, they are still somewhat confusing. To be violative of the due process clause of the fourteenth amendment, however, the instruction complained of by the petitioner herein must be such as would constitute a failure "to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 319 U. S. 219, 236 (1941). While the jury instructions in the petitioner's trial contained an evident distinction in the quantum of proof required for establishing an alibi and for proving the guilt of the defendant, it is the view of this Court that the distinction is not of a sufficient magnitude to be violative of the due process clause. See *Leland* v. *Oregon*, 343 U. S. 790 (1952). Although the instruction involved herein may not be a model of clarity, it is not violative of the due process clause of the fourteenth amendment to the Constitution.

It might be worthwhile to note parenthetically that, even if it were determined that the alibi instruction was unconstitutional, there is serious doubt as to whether such a decision should be applied retrospectively. Since there is no need to explore in depth the problem of retroactivity as it applies to the constitutional problem now before the Court, suffice it to comment that under the teachings of *Linkletter* v. *Walker*, 381 U. S. 618 (1965) and *Tehan* v. *United States*, 34 U. S. L. Week 4095 (January 18, 1965), it is doubtful that a decision holding the alibi instruction involved herein to be unconstitutional should be given retroactive effect.

After carefully reviewing all of the documents which have been presented in connection with the instant petition, this Court concludes that no useful purpose would be served by conducting an evidentiary hearing at this time.

IT IS ORDERED that the petition of Gale H. Johnson, filed February 16, 1966, be and is hereby denied.

Dated this 29th day of March, 1966.

/s/ ROY L. STEPHENSON,
Chief Judge.

(This order bears a filing date of April 26, 1966, and is accordingly referred to as the order of that date in the attached petition.)

IN THE UNITED STATES DISTRICT COURT
for the Southern District of Iowa,
Central Division.

GALE H. JOHNSON,
No. 16614,
Petitioner,
vs.
JOHN BENNETT, Warden,
Iowa State Penitentiary,
Respondent.

Civil No.
7-1848-C-1.

ORDER.

This matter is now before the Court upon the petition of Gale H. Johnson for a writ of habeas corpus. The petition was originally filed on February 16, 1966. After receiving a response to an order to show cause and granting petitioner additional time for filing affidavits in support of his claims, the Court entered an order on April 26, 1966 denying the petition. An attorney, Mr. Norman Jesse, then entered an appearance on behalf of the petitioner and requested the Court reconsider its previous order and grant petitioner an evidentiary hearing upon his claims. The Court granted the request and, after petitioner moved for continuance of the hearing from the date it was originally scheduled, an evidentiary hearing was held on July 22, 1966. At the close of the evidence on that day, the hearing was continued and additional testimony was taken on August 30, 1966. Although previous to the hearing the Court limited the issues to be considered, the Court informed petitioner at the hearing that he could make an offer of

proof on anything he desired. At the close of the evidence in this matter, counsel for both parties requested permission to file written briefs. The final brief was filed on November 10, 1966.

An indictment was returned on September 25, 1934 by the Grand Jury of Des Moines County charging that on or about the 27th day of May, 1934, the petitioner herein, Gale H. Johnson, did willfully, unlawfully, feloniously, deliberately, premeditatedly and with malice of forethought kill F. W. Sauer. A plea of not guilty was entered to the indictment. On November 24, 1934, a jury found Gale H. Johnson guilty of second degree murder. The petitioner was sentenced to the penitentiary at Fort Madison, Iowa, for life on December 10, 1934.

The petitioner now contends that he is being unlawfully detained because his conviction was obtained by a denial of due process of law in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, in that:

> "A. He was denied an important trial witness when, pursuant to a Court Order, a subpoena was issued for Thomas Orsucci, and the Sheriff of Polk County failed to serve the same, but falsely informed the Court and defense that, 'Thomas Orsucci is in Clarinda institution for the insane.'
>
> B. He was denied sufficient notice and time to prepare for trial in connection with the matters contained in the Notice of Additional Testimony.
>
> C. His conviction was secured by the use of the perjured testimony of Drew Orton and Clarence Ruggles, and notes forged by them.
>
> D. State's Exhibits One and Two, being the notes above referred to, were admitted into evidence without foundation and contrary to the rules of evidence.
>
> E. He was denied the presumption of innocence by Instruction 16 or the 'alibi instruction.'
>
> F. He was denied his trial records after tendering fees and costs."

Claims E and F have been adequately discussed in the Court's order of April 26, 1966, and will not be reviewed at this time. Evidence relating to the other claims was presented at the hearing. These claims will be reviewed at this time.

There is circumstantial evidence now before the Court indicating that petitioner Johnson was deprived of the opportunity of calling Thomas Orsucci as a witness on his behalf at his trial.[1] Petitioner contends that the suppression of this witness constituted a denial of due process of law. As indicated in a previous order, the applicable law governing this problem was enunciated by the Supreme Court of the United States when it held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963).

Petitioner Johnson was convicted of the murder of a Burlington police officer. Although there were no witnesses to the actual shooting, two witnesses saw two men—one carrying a shotgun—walking briskly away from the scene of the crime immediately following the shooting. Thomas Orsucci was arrested and charged in connection with the slaying of the police officer. Orsucci was later released and the charges against him dismissed for lack of sufficient evidence. One of the witnesses who observed the two men near the scene indicated that Orsucci resembled one of the men, but was unable to make a positive identification.

1. The return on subpoenas from the sheriff of Polk County stated that "service has been secured upon all * * * except Thomas Orsucci is in Clarinda institution for insane." Thomas Orsucci also was known by the name of Thomas Saunders. The records of the Polk County jail indicate that a man by the name of Thomas Orsucci was incarcerated therein during petitioner's trial.

The other witness stated that Orsucci was not one of the men. However, both witnesses gave positive identifications that Johnson was the man carrying the shotgun. Petitioner urges that testimony from Thomas Orsucci concerning his arrest and subsequent release would have tended to impeach the testimony of the two identifying witnesses and the denial of such testimony constituted a violation of due process of law. This Court disagrees. Johnson was positively identified by two witnesses. The failure of these witnesses to identify the other man, even though one witness indicated that Orsucci resembled the second man, does not impeach their positive identification of Johnson. Under the circumstances, the Court cannot now find that Orsucci's testimony was evidence material to the guilt or punishment of Johnson.[2] Petitioner is entitled to no relief on his claim that he was deprived of an important trial witness.

Petitioner's remaining contentions center around the introduction of two notes at his trial and the testimony of Drew Orton and Clarence Ruggles. It is claimed that the notes were forged and the testimony of these witnesses was perjured. It is also urged that Johnson's trial attorney was not informed of the existence of the notes in time for him to prepare a proper defense on this aspect of the case. In connection with this latter contention, the Court has previously observed that the "Notice of Additional Testimony" served upon petitioner shortly before his trial complied with the statutory provisions of the Iowa Code § 780.10. Nevertheless, petitioner contends that his counsel was not given adequate time to prepare a defense to the evidence contained in the Notice—that being

2. It should also be noted that the affidavit of Thomas Orsucci stating that he "had knowledge of certain facts pertinent to his (petitioner's) defense" was executed February 11, 1949. No attempt or request was made to take Orsucci's deposition or perpetuate his testimony. Orsucci died in 1965.

the testimony of Ruggles and Orton. Petitioner therefore claims that he was denied effective assistance of counsel. It must be noted that petitioner's able trial counsel visited the Fort Madison penitentiary one day in advance of trial in an attempt to investigate the evidence contained in the Notice. The investigation appears to have been successful in that the defendant's trial witnesses included L. E. Yates, a convict at the penitentiary. Yates testified that the witnesses Orton and Ruggles were trying to frame Johnson and that the notes introduced into evidence by the State purportedly written by Johnson were fakes. The jury apparently gave little credence to Yates' testimony. In view of the defense evidence attempting to rebut the evidence contained in the Notice, this Court does not accept petitioner's contention that he was deprived of due process of law because he was not given sufficient notice in connection with certain of the prosecution's evidence.

Petitioner's final contention is that his conviction was obtained by the use of perjured testimony and false documents. If such evidence were knowingly used by the prosecution, such use would constitute a denial of due process. *Napue* v. *Illinois*, 360 U. S. 264 (1959). The petitioner has not in this instance established that the prosecution knowingly participated in the use of such evidence. Thus, the dual questions now to be determined are "were perjured testimony or false documents introduced into evidence at petitioner's trial?" And "if such evidence was received, did it result in a trial which was fundamentally unfair?" *Kyle* v. *United States*, 297 F. 2d 507 (2d Cir. 1961). There is undoubtedly conflicting evidence as to whether the witnesses Ruggles and Orton committed perjury and whether the notes were false. This conflict was raised in the trial itself through the testimony of L. E. Yates. Petitioner has filed several affidavits tending to support his contention that perjured testimony and false

evidence were used to obtain his conviction. The affidavits of Clarence Ruggles are the ones most strongly supporting petitioner's contention. However, these affidavits have been expressly repudiated by Ruggles in a deposition taken at the direction of this Court. In addition to the affidavits, petitioner has presented the testimony of a handwriting expert to the effect that the notes introduced at the trial were not written by Johnson and the handwriting expert who testified at the trial, Mr. Faxon, was erroneous in his conclusion that they were. Respondent's handwriting expert concurs in this view. In this connection, it is appropriate to point out that the trial court instructed the jury on this aspect as follows:

Instruction 17:

Our statute provides that evidence respecting handwriting may be given by experts by comparison, or by comparison by the jury with writing of the same person which are proved to be genuine. Evidence of this character has been introduced upon this trial, and it is proper for the jury to carefully consider the testimony of the witness and to say how much weight shall be given to such testimony, taking into consideration the amount of experience, knowledge and skill possessed by the witness about the matter concerning which his opinion has been given. But, while it is proper to consider such evidence, it is proper to remark that it is the lowest order of evidence, or evidence of the most unsatisfactory character. However upon this question you will compare the writings in dispute with writing of the defendant which you may find proved to be genuine, and in considering this question and doing this you may and should use your own judgment, from comparison of such writing, with the writings in controversy in determining whether or not the defendant actually wrote such alleged writings; and it is your duty and privilege to give your own comparison and knowledge gained from such comparison such weight as you think it entitled to, in

connection with the other evidence admitted upon the trial upon this question.

Although petitioner has raised some doubt as to the validity of the notes introduced at his trial, he has failed to establish to the satisfaction of this Court that his conviction was obtained through the use of perjured testimony. Moreover, after reviewing the abstract of record of petitioner's trial, this Court is convinced that the record indicates that petitioner's trial counsel, Mr. Doran and Mr. Finley were able, vigorous and persistent in presenting the case for the defense. Petitioner was afforded a trial consistent with fundamental concepts of justice.

IT IS ORDERED that the petition of Gale H. Johnson for a writ of habeas corpus be and is hereby denied.

Dated this 6th day of December, 1966.

/s/ ROY L. STEPHENSON,
Chief Judge.

APPENDIX B.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 18,744.

GALE H. JOHNSON,
Appellant,
vs.
JOHN E. BENNETT, Warden Iowa State Penitentiary,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

(November 28, 1967.)

Before VAN OOSTERHOUT, MATTHES and MEHAFFY, *Circuit Judges.*

VAN OOSTERHOUT, *Circuit Judge.*

This is an appeal by Gale H. Johnson, hereinafter called defendant, from final order of the district court entered after a full and fair evidentiary hearing denying his petition for a writ of habeas corpus. The record shows that the defendant is presently serving a life sentence in the Iowa penitentiary as a result of his conviction by a jury of second degree murder and the permissible life sentence imposed under Iowa law as a result of such conviction.

The conviction was affirmed upon appeal; rehearing was denied. *State* v. *Johnson,* 264 N. W. 596; 267 N. W. 91. The trial court has filed two opinions in this case, one on April 26, 1966, and a final opinion on December 6, 1966. This appeal is from the orders of dismissal based upon such opinions.

The trial court issued a certificate of probable cause under 28 U. S. C. A. § 2253 which concludes, "It is ordered that the application of petitioner Gale H. Johnson for the issuance of certificate of probable cause is hereby granted." In the discussion preceding the order, the trial court stated that the certificate is being granted on the basis of asserted violation of constitutional rights arising out of the alibi instruction and that other issues involve factual determinations which would not warrant a certificate. Upon the basis of such statements, the State contends that this appeal is limited to the alibi issue. We do not agree. The order portion above quoted contains no restriction upon issues to be considered upon appeal and it is our view that the order granting the certificate does not limit the issues which defendant may raise upon this appeal. While we have considerable doubt whether the trial court can limit issues to be considered upon appeal by limitations in the certificate, we do not reach such issue here.

The jurisdictional issue of exhaustion of state remedies is not raised by either party. The record before us is not as satisfactory on this issue as we would like to have it. It does appear however that defendant has filed three habeas corpus applications in the appropriate state district court and that he has also filed an original habeas corpus application with the Supreme Court of Iowa, presumably raising the issues here asserted. All such petitions were denied without an evidentiary hearing. The Iowa Supreme Court petition was denied on January 6, 1966, by a summary order stating in substance that the legality of peti-

tioner's imprisonment had been determined by the affirmance of his conviction upon direct appeal and by orders denying prior petitions for habeas corpus. So far as we can ascertain, neither the Iowa legislature nor the Iowa Supreme Court has liberalized the rules for consideration of post-conviction attacks asserting federal constitutional rights have been violated in the proceeding resulting in the conviction. As stated by the Supreme Court in *Case* v. *Nebraska,* 381 U. S. 336 (concurring opinions), it is highly desirable that the states solve their own problems by providing an adequate means of review of post-conviction attacks asserting substantial violation of federal constitutional rights. See *Baines* v. *Swenson,* 8 Cir., ... F. 2d ..... (Oct. 31, 1967).

Upon the record before us, we believe there has been a sufficient showing of exhaustion of available state remedies and that jurisdiction exists in the trial court to consider the petition and in this court to entertain the appeal. See *Fay* v. *Noia,* 372 U. S. 391; *Townsend* v. *Sain,* 372 U. S. 293.

We now proceed to the consideration of the issues presented by this appeal. Defendant for reversal relies upon the following asserted errors:

I. The use of false evidence against the accused is in conflict with the due process clause of the Fourteenth Amendment and vitiates defendant's conviction.

II. Suppression of the testimony of Orcussi, an important witness, constitutes a denial of due process.

III. The alibi instruction given, which shifts the burden of proof of alibi to defendant, destroys the fundamental presumption of innocence.

IV. The court erred in determining petitioner was afforded a trial consistent with the fundamental concept of justice.

The facts pertinent to this litigation are set out in the opinion of the Supreme Court of Iowa in *State* v. *Johnson*, supra, and in the memorandum opinions of the trial court. We shall limit our factual recital to the bare essentials necessary for the consideration of the issues presented.

It is established beyond question that a police officer was fatally shot about 5:30 a.m. on May 27, 1934, while investigating a burglary at a Burlington store. Defendant at his trial was connected with the murder by two types of evidence, identification testimony and testimony relating to an alleged admission by defendant. The two witnesses, Chumney and Emerson, who resided near the shooting area, testified they heard the fatal shot and that from their homes they saw two persons, one of whom was the defendant, walking rapidly down the street away from the murder scene and enter and drive away in a black Ford automobile, and that the defendant was carrying a sawed off shot gun. The credibility of their testimony that they were able to identify the defendant, whom they had not previously known, in the short available interval in light of the intervening distance and obstructions, was sharply challenged at the trial.

Defendant did not testify himself but presented eight witnesses who testified that defendant was in Des Moines, one hundred and sixty-four miles distant, at the time of the shooting. If the alibi witnesses' testimony is accepted, defendant could not have committed the crime. We agree with the determination of the Supreme Court made on the appeal that the credibility of the identification witnesses presented a fact issue for the jury.

Defendant was kept at the penitentiary for safekeeping prior to his trial. Two fellow prisoners, Ruggles and Orton, testified at the trial that they heard defendant admit to another prisoner, Yates, that defendant had killed the officer. Yates denied that such statement was ever

made to him and there is also evidence that defendant was at all times under close guard and would have been unable to communicate with Yates. Such testimony is referred to in the affirming opinion of the Iowa Supreme Court as testimony supporting the conviction.

At the trial, Ruggles and Orton claimed to have intercepted notes purportedly written by the defendant for smuggling outside the institution.

I.

Defendant, upon the basis of *Miller* v. *Pate*, 386 U. S. 1, and *Mooney* v. *Holohan*, 294 U. S. 103, urges that the use of false evidence against him violates the due process clause of the Fourteenth Amendment. Such statement is too broad. The Court in *Miller* v. *Pate* thus states the applicable rule:

> "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Mooney* v. *Holohan*, 294 U. S. 103. There has been no deviation from that established principle. *Napue* v. *Illinois*, 360 U. S. 264; *Pyle* v. *Kansas*, 317 U. S. 213; cf. *Alcorta* v. *Texas*, 355 U. S. 28. There can be no retreat from that principle here." 386 U. S. 1, 7.

In the *Miller* case, the Court found that the prosecutor at the time of trial knew the incriminating shorts were stained with paint and the stains were passed off at the trial as blood stains.

Napue v. *Illinois*, 360 U. S. 264, extends the rule to the situation where the prosecution, although not soliciting false evidence, "allows it to go uncorrected when it appears."

So far as we have been able to ascertain, all the Supreme Court cases setting aside convictions for want of due

process by reason of the reception of false testimony are based upon the knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed. Such would appear to be a proper limitation of the rule. If convictions could be set aside years after they became final merely upon proof that some testimony of a witness proved to be false, there would be no finality to convictions and the orderly administration of justice would be unduly hampered.

There is no substantial evidence here to support a finding that the prosecutor knowingly used false testimony or that he permitted false testimony received to stand uncorrected. It is the claim of the defendant that certain notes which Orton and Ruggles intercepted were improperly received in evidence upon the basis that they were in defendant's handwriting. There is evidence that such notes were designed for smuggling out of the prison and contained language such as, "Have wife tell same story. Have nothing on me. Do what you said you would for me." and, "They have nothing on any one. All they have to do is just keep still." Mr. Faxon, a recognized handwriting expert from Chicago, testified at the 1934 trial that such notes were in defendant's handwriting. Defendant in the present proceeding produced expert testimony that the writing on the notes was not his, and the State's present expert agrees with such testimony. There is nothing in the record to indicate that Mr. Faxon was not expressing his honest opinion or that the prosecution did not in good faith rely upon his opinion. The difference in the expert handwriting testimony may well be based upon advancements made in the science of handwriting analysis in the years that have intervened since the 1934 trial.

A further claim is made that Ruggles' testimony at the trial is false. Some support is found for this in affidavits provided by Ruggles to an attorney employed by the de-

fendant. Subsequently by court order Ruggles' testimony was taken and the transcript thereof is in evidence. In such deposition, Ruggles repudiates the statements made in the affidavit and the burden of his testimony is that his testimony at the trial was correct.

We agree with the trial court's determination that defendant's conviction is not tainted by the knowing use of perjured testimony by the prosecution or by the suppression by the prosecution of material evidence.

II.

By reason of defendant's poverty, the court directed that certain witnesses, including Thomas Orcussi, be subpoenaed for the defendant at State expense. The sheriff at Burlington assumed responsibility for the service of such subpoenas by sending them to the sheriff of Polk County for service upon the witnesses residing in Des Moines. With respect to Orcussi, the subpoena was returned unserved with the notice, "Thomas Orcussi is in Clarinda Institute for Insane." No further attempt was made to secure Orcussi, apparently in reliance upon such statement, and Orcussi did not appear as a witness at defendant's trial.

In the present proceeding, the Polk County jail records were introduced in evidence and they disclose that Orcussi was in the Polk County jail serving a thirty-day sentence for intoxication during the period the subpoena was in the hands of the Polk County sheriff for service. The jail records show nothing with respect to the transfer of Orcussi to a mental hospital. The trial court in its opinion observes that his independent investigation discloses that the records at the Clarinda Institution do not show that Orcussi was ever received at such institution. Such evidence establishes a prima facie case that the return of the

Polk County sheriff is false. No explanation has been made by the State. Fairness requires an observation that persons who might be in a position to explain the return are no longer available. The record indicates that the prosecuting attorney had no knowledge of the falsity of the return, and defendant as a witness states that he has no evidence to the contrary. On this issue, the trial court states:

> "[T]he applicable law governing this problem was enunciated by the Supreme Court of the United States when it held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963)."

The State does not question the soundness of the law above quoted. An interesting question is raised as to whether "the prosecutor" is chargeable with the suppression of evidence for which the sheriff of another county of the state, apparently having no connection with the prosecutor, is responsible. We need not reach such problem here as we agree with the trial court's determination that no prejudice resulted from the failure to have Orcussi as a witness at the trial.

An affidavit of Orcussi dated February 11, 1949, is in evidence wherein he states that he was in the Polk County jail at the time of defendant's trial and that he was willing to testify as a witness on defendant's behalf and that, "I have knowledge of certain facts pertinent to the defense." Orcussi died in 1965. Orcussi never made any disclosure of what information, if any, he had. Defendant as a witness in the present proceeding stated that he visited with Orcussi while Orcussi was a fellow prisoner in the penitentiary subsequent to the trial; that Orcussi

was arrested on the same murder charge as the one upon which defendant was convicted; that Orcussi was held for a time and "that he had been partially identified or had been identified to some extent but I am not certain by what witnesses." The only witnesses at the trial who identified defendant as being near the scene of the crime were Chumney and Emerson. The prosecuting attorney, Mr. Dailey, as a witness in the present proceeding testified that Emerson thought Orcussi looked like the man he saw with the defendant but that he was unable to positively identify him and that the other identifying witness, Chumney, positively stated that Orcussi was not the man. Orcussi was held for a time for investigation but the proceeding against him was dismissed before defendant's trial for want of evidence sufficient to convict.

Thus it would appear that the only possible use of Orcussi as a witness, as far as the record reveals, would be to attempt to impeach the witness who identified the defendant. Orcussi was never identified by Chumney and was not positively identified by Emerson and hence it is difficult to see where his testimony would have been of any value to the defendant. Defendant's counsel could have obtained this same evidence at the trial by cross-examination of Emerson and Chumney. No significant reference to Orcussi was made during the trial.

We agree with the trial court's conclusion that "the court cannot now find that Orcussi's testimony was evidence material to the guilt or punishment of Johnson. Petitioner is entitled to no relief on his claim that he was deprived of an important trial witness."

III.

Defendant next makes a twofold attack on the alibi instruction given by the court. The first objection is to the language in the instruction directing the jury to look upon the alibi defense with caution. Such attack was considered and rejected upon direct appeal. The attack does not reach constitutional proportions and is not entitled to consideration here.

The second and more serious attack is that the instruction given deprives the defendant of the presumption of innocence in that it improperly places the burden of proof of alibi upon the defendant. The instruction given does place the burden of proof on the defendant to establish his alibi defense by a preponderance of the evidence and then goes on to say, "The evidence upon this point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him."

As pointed out by the defendant, this court disapproves a similar instruction in *Glover* v. *United States,* 8 Cir., 147 Fed. 426, upon the basis that the instruction improperly shifts the burden of proof to the defendant. We stated:

> "It loses sight of the fundamental rule in criminal procedure that the defendant is presumed to be innocent of the offense with which he is charged; that this is a continuing presumption which attends him like a guarding spirit throughout the ordeal of his trial, and imposes upon the prosecution the burden of overcoming such presumption by such weight of evidence as will satisfy the minds of the triers beyond a reasonable doubt of the defendant's guilt. This reasonable doubt in his favor applies to the evidence in its entirety and necessarily to any part of it." 147 Fed. 426, 431.

We also determined that an addition, similar to the last sentence of the instruction here given, did not cure the prior portion of the instruction placing the burden upon the defendant to prove alibi and that the incongruous instructions "were well calculated to confuse the understanding of the jury as to how they should apply the rule of reasonable doubt."

The Supreme Court has not passed upon the validity of this type of instruction but the great weight of authority supports the view that such an instruction is erroneous. See *Thomas* v. *United States*, 9 Cir., 213 F.2d 30; Comment, 49 Iowa L. Rev. 590.

We note that the Iowa court has consistently upheld an alibi instruction similar to that given here although the court is sharply divided upon this issue. *State* v. *LaMar*, 151 N. W. 2d 496; *State* v. *Stump*, 119 N. W. 2d 210. The federal district court, while finding the alibi instruction confusing and not a model of clarity, on the basis of the instructions as a whole determined that the instruction did not result in a fundamental unfairness of sufficient magnitude to be violative of the due process clause, citing *Leland* v. *Oregon*, 343 U. S. 790. It is quite true that in other instructions the court stressed the presumption of innocence, reasonable doubt and the necessity of the State proving all essential elements of the case beyond a reasonable doubt. It is difficult to say on the basis of the instructions as a whole that the defendant was deprived of any substantial constitutional right.

When this case was tried in 1934, the instruction challenged had the full backing of the Iowa Supreme Court. This case was finally adjudicated long before the Supreme Court determined federal constitutional rights guaranteed by the first ten amendments are to be applied to state proceedings by reason of the Fourteenth Amendment. The

trial court based its decision in part on cases denying retroactive application to newly determined constitutional principles. We are not squarely confronted with retroactivity here as there has been no authoritative decision by the Supreme Court determining the challenged instruction violates federally guaranteed constitutional rights. However, the reasoning of the Supreme Court cases dealing with retroactivity lends support to the determination that the conviction should not be set aside by reason of the alibi instruction. The cases hold that retroactive application of newly announced constitutional determinations to state prosecutions shall be determined on a case-to-case basis. In a number of situations, retroactive application has been denied. Thus in *Linkletter* v. *Walker,* 381 U. S. 618, the rule of *Mapp* v. *Ohio,* 367 U. S. 643, holding that illegally seized evidence could not be used in a state criminal proceeding, was denied retroactive application.

In *Johnson* v. *New Jersey,* 384 U. S. 719, the Court held that the rules of *Escobedo* v. *Illinois,* 378 U. S. 478, and *Miranda* v. *Arizona,* 384 U. S. 436, with respect to police interrogation without proper warning, should not be applied retroactively. In *Tehan* v. *Shott,* 382 U. S. 406, the Court held that the pronouncement of *Griffin* v. *California,* 380 U. S. 609, proscribing adverse comment on defendant's failure to testify by prosecutors and judges in state criminal trials, is not to be given retroactive effect. There are other cases, such as *Gideon* v. *Wainwright,* 372 U. S. 335 (right to counsel), and *Jackson* v. *Denno,* 378 U. S. 368 (coerced confession), where newly adopted constitutional rules have been given retroactive effect. The tests with respect to retroactivity are fully discussed in the foregoing cases.

No challenge was made to the alibi instruction on constitutional grounds in the defendant's trial resulting in his conviction or in his appeal therefrom. We have little doubt that such challenge, if then made, would have been rejected. We do not believe that the challenge now made, even in the event it is entitled to be upheld under present day standards, would be given retroactive application to the 1934 conviction.

IV.

Lastly, defendant urges that he has not been afforded a fair trial. In addition to the specific complaints heretofore discussed, defendant claims he was prejudiced by the prosecutor's vigorous argument pointing out that he did not take the witness stand to deny the charge; by unfavorable publicity at the time of the trial; and other improper conduct on the part of the prosecution. We are here considering a collateral attack upon a conviction, not a direct appeal. Only errors reaching constitutional dimensions can be considered and such errors must be fairly raised and established by the defendant.

The errors in this division were not raised by the defendant's petition and were not presented to or considered by the trial court. Issues not properly raised in the trial court cannot be considered upon appeal. The most substantial issue, which relates to comment on defendant's failure to testify, is foreclosed by *Tehan* v. *Shott*, supra.

Defendant was tried before Judge Hale, a fair and able judge who later served with distinction on the Supreme Court of Iowa. Defendant was represented by capable lawyers of his own choosing both at the trial and upon

the appeal. All issues raised at his trial and upon appeal received fair consideration upon the basis of the applicable legal standards then existing. Defendant has failed to establish the violation of federal constitutional rights of such magnitude as to entitle him to a new trial.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C.

Instruction number 16 at petitioner's trial, objected to by the defense, read as follows:

"Evidence has been admitted on behalf of the defendant of what is known as an alibi, which means that the defendant at the time that the alleged murder is charged to have been committed was at another place so that he could not have committed the same. You are instructed that such defense is proper and legitimate as any other, and you are also instructed that you scan the proof of alibi with care and caution, and all the evidence upon this point both for and against this claim of alibi should be scrutinized wth care and carefully considered by the jury.

"The burden is upon the defendant to prove this defense by a preponderance of the evidence, that is, by the greater weight or superior evidence. The defense of alibi to be entitled to be considered as established must show that at the very time of the commission of the crime the accused was at another place so far away, or under such circumstances that he could not with ordinary exertion have reached the place where the crime was committed so as to have committed the same. If by a preponderance of the evidence the defendant has so shown, the defense must be considered established and the defendant would be entitled to an acquittal. But if the proof of alibi has failed so to show, you will not consider it established or proved. The evidence upon this point is to be considered by the jury, and if upon the whole case including the evidence of an alibi, there is a reasonable doubt of defendant's guilt, you should acquit him."

Original trial record 374-5.